

Straightening Out Federal Review of State Criminal Cases

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I. INTRODUCTION

The federal judiciary, since its establishment in 1789, has been vested with authority to review state cases, criminal as well as civil, when a controlling issue of federal law is involved. In the beginning that power could be exercised solely through review in the United States Supreme Court of final state judgments.¹ The constitutionality of that federal power in relation to state criminal cases was authoritatively settled in 1821 in *Cohens v. Virginia*.² That arrangement for federal control over the state criminal process has remained unimpaired, at least formally, to the present.³

The enactment in 1867 of an amendment to the federal habeas corpus statutes opened a new possibility for federal judicial review of state criminal cases.⁴ The statute authorized federal trial courts to issue writs of habeas corpus on behalf of any person in custody "in violation of the constitution," even though the detention was at the hands of state and not federal authorities.⁵ The potential of this statute was not realized for nearly a century. It had little effect on the relationship of federal courts with the state judicial process until the middle of the twentieth century. Then the tidy, symmetrical arrangement of direct Supreme Court review following promptly on the heels of state supreme courts' affirmation of convictions began to be unsettled by a series of decisions interpreting the federal habeas corpus statute. The series culminated in a trilogy of cases in 1963, which created a wholly new scheme for federal review of state criminal cases.⁶

Under the scheme established by these Supreme Court decisions, the federal district courts became the principal means through which the federal judiciary exercised its authority over the state criminal process. Although the Supreme Court's power to review final state criminal judgments remained in place, as a practical matter it became almost surplusage; the real power was transferred to the trial level of the federal judiciary. Under the 1963 decisions, the federal district courts were empowered to review any alleged federal constitutional defect in the process leading to a state criminal conviction,

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1. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

2. 19 U.S. (6 Wheat.) 264 (1821).

3. 28 U.S.C. § 1257 (1976).

4. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385-86 (current version at 28 U.S.C. § 2241 (1976)).

5. *Id.* at 385.

6. *Sanders v. United States*, 373 U.S. 1 (1963); *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963).

whether or not it had been raised in the state proceeding and whether or not it had been passed upon by the state courts. Federal district courts were empowered to hold de novo evidentiary hearings on any such alleged federal violations. This sweeping authority substantially altered the relationship between the federal judiciary and the state courts in criminal cases. It is the kind of shift that one would ordinarily assume to be of a legislative character, involving institutional rearrangements and delicate policy judgments concerning federalism. This arrangement has been the subject of controversy and lively debate for twenty years.

Two circumstances provided practical justification for this arrangement. One was the Supreme Court's lack of capacity to afford meaningful review in all the state criminal cases in which that review was necessary to assure observance of the federal constitution. This incapacity resulted from the Supreme Court's swollen docket and the increase of state criminal business involving federal questions. The other was the felt necessity, in light of the inadequacy of many state records, to provide a federal forum in which the evidentiary record concerning the alleged violation could be fully developed.

What made these circumstances increasingly compelling was the rapid growth in the number of federal constitutional questions that could arise in state criminal cases. This growth was the product of Supreme Court interpretations of the fourteenth amendment. In turn, this proliferation of possible federal questions meant that a greatly increased percentage of state criminal convictions could be subjected to Supreme Court review. Thus, in sheer quantity, the number of cases began to outrun the capacity of the Supreme Court. Many of these newly emerging federal questions depended heavily on the facts. Not surprisingly, the state criminal process was not always attuned to a full development of such facts; nor were state trial judges always oriented to making the sort of detailed factual findings that would permit meaningful Supreme Court review on direct appeal. Yet, as in all direct appellate review, the Supreme Court was limited to the state record. In 1963 the Supreme Court apparently believed the answer to both of these difficulties—lack of quantitative capacity in the Supreme Court and the inadequacy of state records—lay in opening the federal district courts to the review of state criminal cases.

In the 1970s, Supreme Court decisions began to modify this arrangement. Now procedural defaults in the state courts may more readily foreclose the availability of federal habeas corpus⁷ and access to the writ on search and seizure claims is narrower than it was.⁸ However, the review structure stemming from the 1963 decisions remains essentially in place, and it continues to draw criticism.⁹

7. *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); cf. *United States v. Frady*, 456 U.S. 152 (1982).

8. *Stone v. Powell*, 428 U.S. 465 (1976).

9. Among the more frequently cited criticisms are Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Desmond, *Federal Habeas Corpus Review of State Court Convictions—Proposals for Reform*, 9 UTAH L. REV. 18 (1964); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

The critics acknowledge that when there is a substantial claim of federal constitutional violation in a state criminal prosecution the convicted defendant should have access to a federal court for review of that claim. The existing habeas corpus arrangement for accomplishing that review is criticized, however, on the grounds that the federal review process has no terminal point and that it unduly undermines the integrity of state procedure. In short, these criticisms stem from concerns about finality, efficiency, and state authority.

Those who defend the existing scheme stress the two circumstances that produced it—the lack of capacity in the Supreme Court to provide meaningful review and the necessity of a federal forum in which evidentiary hearings can be conducted on the federal claims. Some who endorse the existing arrangements also argue that in the adjudication of federal claims state judges cannot be regarded with the same confidence as can federal judges and that there is even value in “redundant” litigation.¹⁰

Efforts have been made over the years to persuade Congress to alter this review scheme. Recently proposals have been advanced to broaden the federal writ by, for example, legislatively overruling the holding in *Stone v. Powell*.¹¹ Most of the legislative proposals, however, have been aimed at narrowing the writ by giving a heightened res judicata effect to state convictions and by establishing a statute of limitations on the availability of federal habeas corpus review.¹² These latter proposals have been resisted by those who see any move in those directions as eroding federal judicial protection in relation to federal constitutional rights in state criminal cases. Politically, the matter appears to be at dead center; although there is considerable sentiment behind various proposals, the opposition to each suggested change is sufficient to prevent its enactment.

The thesis of this article is that there is a way out of this impasse, that it is possible to design a structure and a procedure to provide a meaningful federal review of state convictions and a substantial measure of finality while simultaneously eliminating inefficient, duplicative, and protracted litigation. A large part of the present difficulty lies in the collateral nature of the federal review scheme, a review of the state conviction that is unrelated in terms of time and procedure to the state process. Orderly procedure, efficiency, and finality can all be served by restructuring the federal review system to link it back to the conclusion of the state process. To do this without eroding federal protection for any constitutional rights requires that the new system be de-

10. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115–31 (1977). The Supreme Court's decisions in the 1963 trilogy were probably based in part on lack of confidence in state judges. See Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286, 290–93 (1966).

11. 428 U.S. 465 (1976). See Boyte, *Federal Habeas Corpus after Stone v. Powell: A Remedy Only for the Arguably Innocent?*, 11 U. RICH. L. REV. 291, 327–31 (1977); Green, *Stone v. Powell: The Hermeneutics of the Burger Court*, 10 CREIGHTON L. REV. 655, 673–77 (1977).

12. The most recent proposals to this effect were introduced in the 97th Congress with the support of the Department of Justice. *Hearings on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 19 (1981) (testimony of Jonathan Rose).

signed to overcome the conditions that gave rise to the present arrangement, namely, that there be an adequate federal appellate capacity to handle all state criminal cases on direct review and that there be arrangements for federal evidentiary hearings when appropriate.

The desired objectives can be achieved and the pitfalls avoided through authorization of direct appellate review of state convictions in the existing United States courts of appeals or in a new federal appellate tribunal, with careful attention given to procedural detail. This system would provide an adequate federal appellate capacity to make that federal review as effective as existing habeas corpus review. To accomplish this, the federal appellate courts would need to have two powers unfamiliar in American appellate practice—the authority to undertake a searching review of the case, passing on issues not raised below, and the authority to dispatch a case temporarily to a district court for an evidentiary hearing. In effect this new style of review would combine traditional appellate review with collateral review, thereby eliminating the existing fragmented review process.

II. AN ALTERNATIVE ARRANGEMENT

A. *Use of Existing Courts of Appeals*

There are several advantages to using the twelve regional courts of appeals as the primary federal forums for reviewing state convictions containing federal questions: the burden would not be unduly heavy on any one federal court; responsibility would be placed in a federal court in the region of the state where the conviction was obtained; the reviewing forum would contain at least some judges from the state where the prosecution took place; and there would be no need to create any new tribunals. There is no constitutional impediment to authorizing direct appellate review of state supreme court judgments in forums other than the Supreme Court. As Hamilton wrote in the *82d Federalist*:

I perceive at present no impediment to the establishment of an appeal from the state courts, to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court.¹³

It has sometimes been suggested that state supreme court justices might take umbrage at having their judgments reviewed by any federal forum short of the United States Supreme Court. The answer to that, of course, is that under the present arrangement state supreme court judgments are being reviewed by United States district courts, the lowest tier of the federal system—courts presided over by a single judge. In comparison, there could hardly be any ground for discontent among the state justices if their judgments were

13. THE FEDERALIST NO. 82, at 379–80 (A. Hamilton) (Hallowell ed. 1842).

reviewed by a higher federal court, a United States court of appeals, sitting in a panel of three judges. If necessary to heighten the dignity of the federal forum still more, the courts of appeals could be authorized by statute in those cases to sit in panels of five judges.

This idea was first put forward publicly by the National Commission on Criminal Justice Standards and Goals in the report of its Courts Task Force published in 1973.¹⁴ The proposal has made little headway, however, largely because of lack of understanding of the procedures that would go with such a direct appellate review. These procedures are outlined below.

One concern about this proposal relates to the added work load that it would place on the already heavily burdened United States courts of appeals. It is difficult to project the exact dimensions of this added load. Statistics are simply not kept in a way that makes reliable projection possible. A rough indication may be gleaned from the number of habeas corpus petitions now filed annually in the federal district courts throughout the country and by taking into account, in addition, the number of certiorari petitions filed in the United States Supreme Court in state criminal cases.

According to the latest available statistics from the Administrative Office of the United States Courts, the total number of habeas corpus petitions filed annually by convicted state defendants in the federal district courts in all the circuits is as follows:¹⁵

<u>Circuit</u>	<u>Habeas Corpus Petitions</u>
1st	125
2nd	663
3d	484
4th	1104
5th ¹⁶	2348
6th	860
7th	658
8th	373
9th	851
10th	300
D.C.	<u>24</u>
Total	7790

These figures are likely, however, to give an overblown picture of the number of cases that would be taken annually from the state supreme courts in these circuits to the courts of appeals. These habeas corpus petitions in-

14. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS 129-31 (1973).

15. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES—ANNUAL REPORT OF THE DIRECTOR 369-74 (1981).

16. This designation includes the 11th Circuit, which was created after the period covered by these statistics.

clude numerous cases originating several years earlier, cases in which the time for seeking direct appellate review would have expired. There is no way to know what proportion of these petitions falls into that category. The probability is that at least a third would be foreclosed. The number, of course, depends on the time limits set for seeking review in the United States court of appeals from the state supreme courts. These figures must also be discounted by the number of cases in which review has previously been sought and denied in the Supreme Court; that number also cannot be ascertained from available data. In any event, the figures shown above are undoubtedly higher than the number of cases that would come directly to the United States courts of appeals under the suggested arrangement.

To these figures must be added the number of cases in which convicted state defendants now seek direct United States Supreme Court review of the state supreme courts' affirmance of their convictions or of collateral attacks on their convictions. During the 1981 Term of the Supreme Court these cases totalled 731.¹⁷ The source of the petitions—that is, the states from which the cases came—cannot be ascertained from readily available information. One could arbitrarily divide the number of cases by twelve to give an average number of sixty-one per circuit. However, that is undoubtedly inaccurate; the larger circuits are likely to have a larger number of state criminal cases within their borders. Perhaps a more reasonable way of estimating the number of such cases in each circuit would be to allocate them in proportion to the number of habeas corpus petitions filed in the district courts of each circuit.

Whatever the precise magnitude of the addition to the courts of appeals' case loads, some additional judgeships will be required on those courts. Because of the difficulty in estimating the dimensions of this new appellate business, it is difficult to estimate the number of these judgeships. However, it should be borne in mind that this arrangement brings no net increase to federal judicial business viewed as a whole. Its major thrust is to transfer the business from the district courts and the Supreme Court to the courts of appeals. This will have the salutary effect of relieving the beleaguered Supreme Court to some extent and of obviating the necessity of increasing the number of district judgeships to the same extent that they would otherwise have to be increased. In the long run, therefore, the additional circuit judgeships will not add any significant costs to the federal judicial system. Indeed, the arrangement will have the benefits outlined above, which, for the country as a whole, and for the state and federal judicial systems in particular, will outweigh any potential costs.

B. Use of a New Federal Appellate Tribunal

Since the early 1970s proposals have been advanced for the creation of a new federal appellate court to be positioned between the regional courts of

17. Letter from the Office of the Clerk of the Supreme Court to Daniel J. Meador (Jan. 27, 1983).

appeals and the Supreme Court. There are numerous ways in which such a court might be constituted and its jurisdiction structured. The Freund Committee proposal in 1972¹⁸ was quite different from that of the Hruska Commission in 1975.¹⁹ Proposals recently pending in the House and the Senate differ as well.²⁰ At hearings held in the Senate in 1981 and 1982, several other variations were advanced concerning the creation of such a tribunal.²¹ Even the suggested names are different. The earliest and most often used name is "National Court of Appeals." In more recent years, however, names such as "Inter-Circuit Court of Appeals"²² and "Multi-Circuit Panel"²³ have been advanced.

Despite the variations in all of these matters, sentiment seems to be growing for the establishment of such a tribunal. The court would be subordinate to the Supreme Court but would occupy a tier above the courts of appeals. There is a high degree of agreement among those who favor the creation of such a court that it should have jurisdiction to hear and decide on the merits any case referred to it by the Supreme Court. This "reference jurisdiction" would make the court a kind of "overflow chamber" for the Supreme Court; it would provide substantial additional appellate capacity at the top of the federal system, thus enabling the federal system as a whole to deliver a larger number of definitive decisions on questions of federal law with nationwide binding effect. In addition to the reference jurisdiction, the court could be given some measure of direct appellate jurisdiction. Proposals to that effect have been advanced from several quarters.²⁴

If Congress should create such an appellate court, state criminal cases would be a promising prospect for its direct appellate jurisdiction. This court would be the only federal forum to which a state criminal case could be brought following a final judgment of the highest state court. This arrangement would provide a single federal forum with nationwide jurisdiction. Proposals to this effect have been advanced by Judge Clement F. Haynsworth,

18. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972).

19. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975).

20. S. 2035, 97th Cong., 2d Sess. (1982); H.R. 4762, 97th Cong., 1st Sess. (1981); S. 1529, 97th Cong., 1st Sess. (1981).

21. *Hearings on S. 2035 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982); *Court Reform Legislation: Hearings on S. 1529 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 20 (1981).

22. H.R. 4762, 97th Cong., 1st Sess. (1981) (Intercircuit Tribunal of the United States Courts of Appeals); _____: *Hearings on S. 2035 Before The Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. _____ (1982) (testimony of Daniel J. Meador) (Inter-Circuit Court of Appeals); Levin, *Adding Appellate Capacity to the Federal System: A National Court of Appeals or an Inter-Circuit Tribunal*, 39 WASH. & LEE L. REV. 1, 16-21 (1982) (Inter-Circuit Tribunal).

23. Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U.L. REV. 881, 882 (1975).

24. _____: *Hearings on S. 2035 Before The Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. _____ (1982) (testimony of Daniel J. Meador); *Court Reform Legislation: Hearings on S. 1529 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 86-120 (1981) (testimony of John H. Pickering, John P. Frank, James D. Cameron, Clement F. Haynsworth, and Erwin N. Griswold).

Jr.²⁵ and Justice James Duke Cameron.²⁶ This arrangement has some advantages over the proposal outlined above to use the existing regional courts of appeals.

The main advantage of this arrangement would be the measure of nationwide uniformity that it would bring to the system. The same tribunal would pass on all federal constitutional questions arising in state criminal proceedings. Thus the law could be kept on an even keel, and its development could be monitored more effectively. Concentrating review of state criminal cases in a single forum would also alleviate pressure on the Supreme Court. If state criminal cases are routed to twelve different regional appellate courts, the Supreme Court is still left in the business of monitoring the work of those twelve courts in order to resolve conflicting decisions among the circuits. With a single appellate court those problems are eliminated, although the Supreme Court would still have a certiorari jurisdiction over the new appellate court's decisions in order to preserve the Supreme Court as the final arbiter of federal constitutional questions.

For the reasons stated earlier, it is difficult to predict the volume of business that would come to the new court under this arrangement. The statistics set out above showing the number of habeas corpus petitions filed annually in the federal district courts and the number of state criminal cases in which direct Supreme Court review is sought are the most pertinent data available. As explained above, they do not provide a basis for precise predictions. Whatever the total caseload would be for the twelve regional courts of appeals, if the state cases were routed to this new appellate court that entire caseload would instead be concentrated there. Although this quantity of cases seems large for any appellate court, the caseload would be manageable if procedures within the court are properly designed and administered.

III. PROCEDURES

Whether one uses the existing courts of appeals or a newly created appellate court, the central feature of either proposal is that all state criminal cases must seek initial entry into the federal judicial system at an intermediate appellate level, not at the district court level or at the Supreme Court level. The procedures through which such a federal review would be administered would be essentially the same whether the existing courts of appeals are used or a new appellate court is used. A brief outline of these procedures follows.

The procedures must be designed to make the appellate review coextensive in scope with the review presently available on habeas corpus. That is,

25. Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597, 604-07 (1974).

26. Cameron, *Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem*, 1981 B.Y.U. L. REV. 545, 558-74.

the appellate court must be able to reach all federal issues that the district courts can presently reach on habeas corpus and must be able to obtain federal evidentiary hearings when necessary. The procedures must have a terminal point, bringing to the system a measure of finality now lacking. The procedures must also be designed to assure that the federal issues receive meaningful review within a reasonable time so that neither do unacceptable backlogs develop nor does review become an empty formality.

To match the scope of review currently available on habeas corpus in the federal district courts, the appellate court must be vested with powers unfamiliar in American appellate practice. The reach of the district courts' authority under the 1963 trilogy is sweeping: on habeas corpus a district court can reach any alleged federal constitutional violation in the state criminal process, even if the question has not been litigated in the state courts. This power was recently modified through a judicially developed waiver doctrine—a convicted defendant who did not raise the federal question in the state courts must now show cause for that failure and prejudice from the federal violation in order to obtain federal habeas review.²⁷ However, this modification still leaves a relatively far-reaching power in the district courts to pass on federal questions that otherwise are not presently open for review on direct appeal from the conviction. Thus, to install a system of direct appellate review in a federal forum the appellate forum must have the same authority. In other words, the federal appellate court must not be strictly limited to reviewing "the record" in the case, as is traditional in American appellate practice. Rather, it must have authority to review "the case," including all federal issues. This is an appellate power similar to that exercised in the Court of Appeal of England; that court can consider issues not raised below and may receive fresh evidence bearing on those issues.²⁸

It is essential that the federal appellate court have these powers in order to be able to reach all potential federal defects in the conviction and thus obviate the need for collateral review. Indeed, not only should the federal appellate court have these powers, but it should be directed to examine the case affirmatively and to ferret out all potential federal violations, subject only to the waiver and forfeiture doctrines mentioned above. The convicted defendant and his counsel should be required to complete an exhaustive check list of federal constitutional defects that might appear in state criminal cases and either assert an argument supporting such a defect or expressly waive any assertion of the point. The normal assumptions of the adversary process should not be left to operate unaided; the court must take an affirmative hand to flush out any possible federal claims that might later work to undo

27. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

28. D.J. MEADOR, *CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS* 71-75, 97-98 (1973).

the conviction on habeas corpus.²⁹ Only by giving the appellate court such a scope of review and such a duty to search the case affirmatively can direct appellate review replace the collateral review now available in the district courts.

When the federal appellate court discovers a possible federal constitutional defect of arguable merit, the court must have the power to obtain a federal evidentiary hearing if the state record is not already adequate to enable the court to pass soundly on the merits of the point. A workable procedure for obtaining such an evidentiary hearing can be developed by authorizing the court of appeals to dispatch the case to the federal district court with directions to hold an evidentiary hearing on the specified point and then to transmit the record of that hearing to the appellate court. Meanwhile, the case can be stayed on the appellate docket. When the appellate court receives the federal district court record of the evidentiary hearing and the findings of the district court, it can then proceed to decide the case on its merits.

Available data indicate that there are relatively few habeas corpus petitions that require evidentiary hearings. A study in the District of Massachusetts showed that hearings were held in 10 to 12 percent of all petitions.³⁰ Another study surveying six federal districts showed that hearings of all kinds, including legal arguments, case conferences, and evidentiary hearings, were held in only 6.2 percent of the cases; the evidentiary hearings were characterized in this study as "exceptional."³¹ Thus, this procedure should impose no great burden on either the appellate court or the district court. Whatever time might be consumed in the transmittal down and back would likely, in the long run, be less than that now required through the dual, inefficient system of collateral review.

In light of the additional case load that this state criminal business will bring to whatever federal appellate court or courts may be employed, the procedures through which review is carried out must be tailored to enable the appellate court to provide a genuine scrutiny on the merits of the federal claims, and yet enable the court to dispose of cases within reasonable times. With that in mind, the procedure by which a convicted defendant seeks review, following affirmance of his conviction by the highest state court, should be by way of a "petition for review" filed in the federal appellate court. The use of this label for this procedure avoids undesirable connotations that may flow from calling the procedure either an "appeal" or a "petition for cer-

29. This style of appellate review in criminal cases was recommended in the NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS 135-36 (1973). The idea was put forward for discussion at the National Conference on Appellate Justice. See Meador, *Remarks: Unified Review in Criminal Cases*, 5 APPELLATE JUSTICE: 1975, at 86 (1975).

30. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 335-37 (1973).

31. U.S. Dept. of Justice, Federal Justice Research Program, Office for Improvements in the Administration of Justice, P.H. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 4(c) (1979).

tiorari.” To call it an “appeal” would imply to some persons that the appellate court is compelled to employ a review process involving the traditional full-length briefs, possibly followed by oral argument and a full-dress opinion; in other words, “appeal” would suggest a too rigid and elaborate process. On the other hand, to call the procedure a “petition for certiorari” might go too far the other way; it might imply that the appellate court could decline to look at the merits of tendered issues simply on the ground that they lack sufficient public importance. Neither process is desirable. What is desired is a procedure that lays before the appellate court the alleged federal constitutional violations and obtains from the judges an informed judgment on the merits of those issues, but does so through a flexible process that can be tailored to the nature of the issues.

A “petition for review” would put the case before the federal appellate court on its merits, just as a “petition for habeas corpus” puts a case before a federal district court for a determination on the merits. This review process would resemble that employed in the Supreme Court of Virginia and the United States Court of Military Appeals.³² In each of those courts appellate review is sought through a “petition”; a denial of the petition is a ruling on the merits of the issues. It is not simply a discretionary refusal to review, such as that involved in a denial of certiorari by the United States Supreme Court.

The petition process allows the court a wide leeway in designing its internal process for examining the merits of the case. Although a denial of the petition would be a final judgment on the merits, a grant of the petition would give the court further options; it could in the same order dispose of the case on its merits or it could direct further proceedings by dispatching the case to the district court for a factual hearing, by setting it for oral argument in the appellate court, or by calling for the submission of additional information from the parties.

A central staff of attorneys in the appellate court would be essential to help assure the requisite thoroughness of review of the merits on all issues and also to assist the judges in an affirmative examination for all possible federal defects. Central staff attorneys have become familiar adjuncts in American appellate courts. They typically provide assistance to the judges by initially screening cases, by preparing memoranda on the issues, and sometimes by drafting proposed short opinions when such opinions seem appropriate. Staff attorneys could perform all these functions for the appellate court in its review of state criminal business. Such staff attorney assistance would enable the appellate court to orchestrate its reviewing processes to give each case the amount of time and thought it deserves. Some cases could be disposed of on the papers; some would require additional evidence or other information; still others would require oral argument in the appellate court. Some cases would deserve more elaborate written opinions from the court than others. On all of

32. D.J. MEADOR, *APPELLATE COURTS, STAFF & PROCESS IN THE CRISIS OF VOLUME 168-73* (1974).

these matters, the assistance of staff attorneys would be helpful, and perhaps essential, to the process of assuring a meaningful review by the judges themselves.³³

In general, the prerequisite for seeking Supreme Court review in a state case—that there be a final judgment of the highest court in which a decision could be had³⁴—should also be applied to review in the federal appellate court for a state criminal conviction. Similarly, there should be a fixed time within which review should be sought following the final state judgment. A period of ninety days, for example, would be reasonable.³⁵ However, in order to permit this federal appellate review to be coextensive with habeas corpus review, provisions should be made for a defendant to apply for review out of time or in a situation in which the case has not been taken to the highest state court to which it could have been taken. There could be unusual circumstances that would prevent an appeal within the state system or that would prevent the pursuit of federal appellate review within the stated time. The federal appellate court should be empowered to consider a case on its merits in exceptional circumstances even though these two prerequisites have not been satisfied. The expectation would be, however, that this consideration would not normally be accorded unless the reasons tendered justified review in the interests of justice.

The grand objective of the arrangement described in this article is to provide a system of affording federal judicial review on federal issues in state criminal cases in a way more sensible, orderly, and efficient than that now existing through the habeas corpus process and to do so in a way that brings the litigation to a conclusion. If the jurisdiction and procedures employed in the federal appellate court are along the lines described above, the final judgment of the federal appellate court will provide assurance that every conceivable federal issue in the case has been reviewed by at least three Article III judges.

The only remaining federal review available would be by petition for certiorari in the Supreme Court in accordance with existing certiorari procedures.³⁶ There would be no need, as a practical matter, for habeas corpus in the district courts, and access to that process would be foreclosed. The provision in section 2244(c) of Title 28³⁷ foreclosing habeas corpus review after a Supreme Court decision on the merits should be amended to apply also to these appellate court decisions. The convicted defendant would have received

33. See generally, e.g., D.J. MEADOR, APPELLATE COURTS, STAFF & PROCESS IN THE CRISIS OF VOLUME 7-18, 31-125 (1974); J. OAKLEY & R.S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS (1980); Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 U.C.L.A. L. REV. 465 (1975).

34. 28 U.S.C. § 2254(b)-(c) (1976).

35. This is the time provided under current Supreme Court Rules for seeking review of state court criminal judgments. SUP. CT. R. 11(1).

36. 28 U.S.C. § 1254 authorizes review in the Supreme Court by certiorari of any case in a court of appeals.

37. 28 U.S.C. § 2244(c) (1976).

all of the federal judicial review—and more—that he would have received by a habeas corpus petition in the district court.

Society would benefit through a clearly defined point of termination to the litigation. State justice officials and correctional authorities would know with confidence whether a conviction and sentence were firm, and they would know this at a reasonably early time following the final state judgment. The convicted defendant would likewise know with certainty that the litigation was at an end following the federal appellate court's decision. In addition to all of these benefits to be derived from the new arrangement, the public would likely gain renewed confidence in the judicial process and in the system of criminal justice, because we would again have a process that flows from initial criminal charge, through trial and appeal, to a point of clear termination, all within a reasonable time.

